

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VIII

IN THE MATTER OF)
)
RICK'S AGRICULTURE SERVICE)
P.O. BOX 32) Docket No. I.F.& R. VIII - 281C
COLFAX, ND 58018)
)
Respondent)

RULING ON MOTION FOR DEFAULT ORDER

On June 26, 1990, an administrative complaint was filed in this matter and issued to respondent pursuant to section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. section 1361 et seq. The complaint alleged that respondent violated Section 12 (a)(2)(L) of FIFRA, 7 U.S.C. Section 136j, and regulations promulgated at 40 C.F.R. 167.85(d), by its failure to file an annual report for the calendar year 1989. The annual report lists information on the types and amounts of pesticides produced and/or distributed by a registered establishment as required by Section 7(c) of FIFRA, 7 U.S.C. §136(c), and 40 C.F.R. §167.5(c). The complaint proposed assessment of a \$3200 civil penalty for the violation.

40 C.F.R. 22.15(a) requires the respondent to file a formal answer to the complaint within twenty (20) days of receipt of the complaint. To date, the Respondent has failed to file an answer to the complaint, notwithstanding repeated requests by the complainant to do so.

The Regional Administrator has delegated his authority to act in these proceedings to the Regional Judicial Officer.¹

On April 25, 1991, complainant filed a Motion for Default Order and Proposed Order pursuant to the Consolidated Rules of Practice, 40 C.F.R. §22.17(a), requesting respondent be found in default for failing to file a timely answer to the complaint. For the reasons set forth below, the respondent is hereby found in default and complainant ordered to submit information as to the size of respondents business to the Regional Judicial Officer for determination of the civil penalty amount.

FINDINGS OF FACT

1. Respondent is a "person" within the meaning of FIFRA §§2(s), 7 U.S.C. §136(s), and as such is subject to FIFRA and the regulations promulgated thereunder.

2. Respondent is a "producer" as defined in §2(w) of FIFRA, 7 U.S.C. §136(w), and 40 C.F.R. §167.1(d).

3. Respondent is registered under EPA Establishment Number 46934-ND-1.

4. FIFRA § 7(c), 7 U.S.C. § 136e(c), requires all registered pesticide producers to file an Annual Report "...of the types and amounts of pesticides and, if applicable, active ingredients used in producing pesticides...."

5. Regulations promulgated pursuant to § 7(c) require such Annual Report to be filed on or before March 1 for the preceding calendar year. 40 C.F.R. 167.85(d).

¹. 40 C.F.R. §22.04

6. Pursuant to 40 C.F.R. 167.85(d), the due date for the 1989 Annual Report is March 1, 1990.

7. Respondent failed to file a 1989 Annual Report with EPA on or before March 1, 1990, as required by § 7(c) of FIFRA.

8. Respondent has violated § 7(c) of FIFRA, 7 U.S.C., §136e(c) and 40 C.F.R. §167.5(c), which constitutes a violation of Section 12(a)(2)(L) of FIFRA, 7 U.S.C., §136j(a)(2)(L).

9. On June 26, 1990, complainant issued respondent an administrative complaint in this matter pursuant to Section 14(a) of FIFRA, 7 U.S.C., §136l et seq.

10. Respondent was served with the complaint on July 2, 1990.

11. As set forth in the complaint, respondent must file an answer to the complaint with the Regional Hearing Clerk within twenty (20) days after service of the complaint.

12. To date, notwithstanding repeated requests by the complainant, respondent has failed to file an answer to the complaint.

13. Respondent's failure to file a timely answer to the complaint is a violation of §22.15(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22 (hereinafter "the Rules").

14. On April 25, 1991, complainant filed a Motion for Default Order and Proposed Order² and served respondent with a

2. 40 C.F.R. §22.17(a)

copy of same on April 29, 1991.

15. Respondent had twenty (20) days from the date of service to reply. As of this date the respondent has failed to reply to the motion.³

DISCUSSION AND CONCLUSIONS

Although the Rules provide that default by the Respondent constitutes and admission of all facts alleged in the complaint,⁴ the courts have held that default judgments are not favored in the law. Schwab v. Bullock's Inc., C.A. 9th, 1974, 508 F. 2d 353; Flaksa v. Little River Marine constr. Co., C.A. 5th, 1968, 389 F.2d 885; Hughes v. Holland, C.A. 1963, 320 F. 2d 781, 116 U.S. App.C.Cc. 59; General Tel. Corp. b. General Tel. Answering Service, C.A. 5th, 1960, 277 F.2d 919. I have reviewed the allegations set forth in the complaint based on these court holdings and the administrative record in this matter.

1. Violation

A review of the administrative record reveals that respondent received the complaint on July 2, 1990. The respondent was required to file an answer within twenty (20) days, by July 22, 1990. No answer is found in the record.

On September 10, 1990, the complainant sent respondent a second letter⁵ informing respondent that an answer to the complaint has not been received. The letter gave the respondent

3. Id.

4. Id.

5. Motion of Default, Ex. 7

10 days from receipt (October 13, 1990) to cure the failure to file an answer.

Sometime after mailing the September 10, 1990 letter, EPA received an undated note from the respondent attached to a 1989 Annual Report form dated July 3, 1990.⁶ The undated note stated "As you can see on this copy this report was made out on July 3, 1990, and mailed to EPA the same day. Thank you. Rick's Ag Service, Inc.". There is nothing in the administrative record to corroborate the date this note was mailed. Further, I find nothing in the note to indicate that the respondent intended it to be an answer to the complaint.

By a letter dated January 22, 1991,⁷ the complainant informed the respondent that the note did not suffice as an answer and offered the respondent a third chance to cure the failure to answer, by filing an answer within 10 days of receipt of the letter. To date the respondent has not filed an answer.

2. Default

On April 25, 1991, complainant filed a Motion for Default Order and a Proposed Order. The motion and proposed order were served on respondent on April 29, 1991. The Rules provide the alleged defaulting party shall have twenty (20) days from service to reply to the motion. To date the respondent has not replied to the motion. I therefore find the respondent in default for

6. Id., Ex. 9

7. Id., Ex. 10

failing to file a timely answer to the subject complaint.⁸

The Rules further provide that "[d]efault by Respondent constitutes, for purposed of the pending action only, an admission of all facts alleged in the complaint and a waiver of Respondent's rights to a hearing on such factual allegations." I hereby specifically find that the respondent admits the violations of Section (a)(2)(L) of FIFRA as alleged in paragraph 10 of the Complaint, and all other facts alleged therein and that the respondent has waived the right to a hearing on such factual allegations.⁹

3. Penalty

The complaint assessed a civil penalty of \$3200 for violations of FIFRA. The Complainant based this assessment on the factors enumerated in FIFRA and the Enforcement Response Policy for FIFRA Section 7(c) Pesticide Producing Establishment Reporting Requirement (the "7(c) Policy").¹⁰ The Policy incorporates those factors set forth in section 14(a)(4) of FIFRA, 7 U.S.C. §1361 (a)(4), i.e. the size of business, the effect on the Respondent's ability to continue in business and the gravity of the violation.

In the instant case, the complainant submitted the affidavit of Mr. Timothy Osag¹¹ which explained how these factors were used

8. 40 C.F.R. §22.17(a)

9. 40 C.F.R. §22.17(a)

10. Motion for Default, Ex. 4

11 Motion for Default, Ex.-5

to determine the penalty amount. Mr. Osag cited previous violations by the Respondent as aggravating factors affecting the gravity of the violation. However, Mr. Osag stated that he had no information as to the size of respondent's business and because of this lack of information placed respondent in the largest business category (Class V)¹², assigned to business with a gross yearly income greater than \$1,000,000.

The Agency's Judicial Officer has held that the Agency's regulations and civil penalty guidelines place the burden of going forward with the evidence regarding the size of the business on the complainant. Helena Chemical Co., Dkt. No 09-0439-C-85-18 FIFRA Appeal No 87-3, Nov. 16, 1989, p.13.

40 C.F.R. s22.17(a) states that "...[if] the complaint is for the assessment of a civil penalty, the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued on default...."

The courts have held that the Administrator and Regional Administrator of the EPA must review the bases for the civil penalty to determine if it is appropriate.¹³ A review of the record reveals no evidence on which to base a determination of the size of the respondent's business. Without some evidence as to the size of respondent's business in the record there is no

¹² This is in accordance with Agency Policy - See 7(c) Policy p. 12.

¹³ Katzson Bros., Inc. v. United States Environmental Protection Agency, 839 F.2d 1396 (10th Cir. 1988)

basis for making such a determination.

The Federal Rules of Civil Procedure (F.R.C.P.) provide some guidance on this issue. Rule 55(b) F.R.C.P. states that:

"(1)...When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk... shall enter judgment for that amount and costs against defendant if he has been defaulted for failure to appear....

The Rule further provides that:

"(2)...In all other case the party entitled to judgment by default shall apply the court therefor;... If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take into account or to determine the mount of damages..., the court may conduct such hearing and order such references as it deems necessary and proper..."

It is therefore evident that where the defendant does not appear (answer), and default is to be entered, there must be some evidence of the amount of damages for the court to act on.

In the instant case a review of the record failed to reveal any information as to the size of respondent's business. Although the Agency's guidance directs that the highest category be use to determine the proposed penalty when there is no evidence as to the size of the business, where the respondent does not appear, there must be some evidence of this factor introduced into the record by the complainant for the decision maker to determine the appropriateness of the proposed civil penalty.

I therefore find the respondent in default for failing to answer the complaint.

I further find that the respondent has waived the right to appear in these proceedings; however,

I find no evidence in the record as to the size of the respondent's business; therefore,

I am unable to determine the appropriateness of the proposed civil penalty.

It is therefore ORDERED: That within twenty (20) days of the date of this order the complainant shall submit to the Regional Judicial Officer information as to the size of respondent's business in support of the proposed \$3200 civil penalty, as determined by the Agency's policy and guidance. Based on this information, I will determine the appropriateness of the civil penalty, whereupon a default order will be issued incorporating the above, in accordance with 40 C.F.R. §22.17.

Date: September 3, 1991

By: Alfred C. Smith
Alfred C. Smith
Regional Judicial Officer.

IN THE MATTER OF: Rick's Agriculture Service, P.O. Box 32,
Colfax, ND 58018, Respondent, Docket No. I.F. & R. VIII - 281C.

CERTIFICATE OF SERVICE

I certify that the original of the forgoing Ruling on Motion for Default Order dated September 3, 1991, was hand delivered this day to:

Joanne McKinstry
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 8
999 18th Street, Suite 500
Denver, Colorado 80202



Alfred C. Smith
Presiding Officer

Dated: Sept. 3, 1991.